United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7380

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In the Matter of the Complaint of Singapore Navigation Company, S.A., as owner of the Steamship SINGAPORE TRADER and China Marine Investment Co., Ltd. and China Overseas Navigation Co., Ltd., Plaintiffs, for exoneration from or limitation of liability.

SINGAPORE NAVIGATION COMPANY, S.A., CHINA MARINE INVESTMENT CO., LTD., CHINA OVERSEAS NAVIGATION CO., LTD.,

Plaintiffs-Appellants,

MEGO CORP., ET AL., JOSEPH MARKOVITS, ET AL., UNITY SEWING SUPPLY CO., ET AL., INTERNATIONAL SEAWAY TRADING CORP., ET AL., KATONE CORP., ET AL., SPARTAN INDUSTRIES, ET AL., ALSTER IMPORT CO., LO-E MANUFACTURING CORP.,

Cargo Claimants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF PLAINTIFFS-APPELLANTS SINGAPORE NAVIGATION COMPANY, S.A., CHINA MARINE INVESTMENT CO., LTD., AND CHINA OVERSEAS NAVIGATION CO., LTD.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

PAGE

Statutes:

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Statement of Issues Presented for Review

A. Preliminary Statement

This is an admiralty and maritime case involving the stranding of the SS SINGAPORE TRADER in the St.

Lawrence River near Clayton, New York on October 15, 1971 with alleged loss and damage to her cargo.

The owner and operators of the SINGAPORE TRADER (hereinafter the shipowner) appeal from an interlocutory judgment entered in the Southern District of New York (Brieant, J.) on May 21, 1975 holding the shipowner liable to the cargo owners (appellees).

The district court correctly concluded that the stranding resulted from an error or errors in navigation by the SINGAPORE TRADER's mariners. However, the court held that the SINGAPORE TRADER was engaged in an "unreasonable" deviation at the time of the stranding and denied the shipowner's demand for exoneration from liability to the cargo owners under COGSA, 46 U.S.C. § 1304 (2) (a), denied the shipowner's alternate demand for limitation of liability under 46 U.S.C. § 183; and dismissed the shipowner's counterclaim against cargo owners for general average contributions resulting from the salvage of the ship and cargo.

The district court concluded that the SINGAPORE TRADER "unreasonably" deviated because after becoming strikebound in New York by an extended International Longshoremen's Association (I.L.A.) strike covering the East and Gulf Coasts of the United States she was diverted to Detroit to deliver her cargo of Christmas goods rather than to the Canadian port of Valleyfield—*even though the district court correctly found that Valleyfield had less efficient facilities than Detroit and that Valleyfield "was congested."*

So far as we can determine this is the *only* adjudicated case in which a shipowner has *ever* been held liable to cargo owners because of an unreasonable deviation where:

(a) The *sole* motive for diverting the ship to another port (here Detroit) in the event of such I.L.A. strike was to avoid foreseeable long delays to the cargo at alternate nearby foreign ports (here Valleyfield, or other Canadian ports) [and thus done *solely* to achieve the mutual goal of the parties to the bill of lading contract—*to deliver a cargo of Christmas goods in time for the 1971 market*];

(b) There was *no fault or negligence* on the part of the shipowner or his agents;

(c) The action of the shipowner and his agents was in all respects *reasonable, prudent* and in *good faith;*

(d) The change in route was *authorized (if not required)* by the bill of lading contracts and the law; and

(e) The "deviation" (if any) was waived by the cargo owners.

B. The Issues Presented for Review

1. The district court erred as a matter of law in improperly interpreting the bill of lading contracts so as to exclude a material provision, Clause 5. This caused the court to erroneously conclude that the re-routing of the SINGAPORE TRADER from New York to Detroit upon the commencement of the I.L.A. strike was a "deviation" *rather than a proper alternate means of performance of the contract,* considering *all* the terms of the contract and *all* the circumstances.

2. The district court erred as a matter of law by applying incorrect standards for determining that the deviation (if any) was "unreasonable."

3. The district court clearly erred as a matter of fact in finding that the shipowner's motive for re-routing the

SINGAPORE TRADER to Detroit was anything other than *solely* an attempt by the shipowner to discharge and deliver the SINGAPORE TRADER's cargo of Christmas goods in time for the 1971 market and was a *reasonable* and *prudent* attempt to achieve the commercial purpose of the transaction.

4. The district court erred as a matter of law in failing to conclude that the cargo owners who were notified of the re-routing of the SINGAPORE TRADER to Detroit, and who never protested or reserved their rights to claim "deviation," thereby waived any right to later claim that the ship unreasonably deviated.

5. The district court erred as a matter of law in failing to exonerate the shipowner from all liability to cargo under COGSA, 46 U.S.C. § 1304(2)(a); or alternatively the district court erred in failing to grant the shipowner limitation of liability under 46 U.S.C. § 183; the district court also erred as a matter of law in failing to give judgment to the shipowner on its counterclaims for general average contributions and freight.

Statement of the Case

The nature of the case, proceedings and disposition in the court below

Shortly after the stranding, two suits were commenced against the shipowner in the Southern District of New York, and the shipowner filed counterclaims therein against cargo for unpaid freight and general average contributions (71 Civ. 5321 and 71 Civ. 5324). On March 27, 1972 the shipowner filed its complaint for exoneration from or limitation of liability for all damage occurring on the

voyage (72 Civ. 1275). Numerous cargo claims were filed in that suit by the cargo owners, appellees here. The shipowner filed a counterclaim against the cargo owners for general average contributions.

The trial in May 1974 was limited to the issues of: a) the cause of the stranding; and b) cargo's contention of "unreasonable" deviation. The damages issues and other issues have been deferred pending appellate finality of this aspect of the case.

On March 26, 1975 the district court rendered its Memorandum Decision* (107a-124a**) which along with the Agreed Findings of Fact (64a-74a) and certain specific Findings of Fact and Conclusions of Law (75a-94a, 100a-106a) constituted the court's Findings of Fact and Conclusions of Law (123a).

On May 21, 1975 the district court entered an Interlocutory Judgment (125a) which among other things, held the shipowner liable to the cargo owners for all damage resulting from the stranding because of the "unreasonable" deviation.

Statement of Facts Relevant to the Issues

The Ship

The steamship SINGAPORE TRADER is a general cargo ship, 459 feet 1 inch in overall length, 63 feet 2 inches in breadth, and her maximum draft is 28 feet 7 inches. She is of 8,172 gross tons and 4,823 net registered tons. Her port of registry is Singapore (65a).

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* 1975 A.M.C. 875. Not yet officially reported.

** Pages suffixed with "a" refer to the Joint Appendix.

Loading Cargo at Hong Kong

In August 1971, at Hong Kong, the SINGAPORE TRADER loaded a full cargo of goods destined for the 1971 Christmas market at New York under 472 bills of lading, and in approximately 74,641 paper cartons which were not palletized or containerized (107a, 67a, 146a, Exhibit Z, Exhibits 13-I, 13-J).

The Bill of Lading Contracts

Each bill of lading contained the following relevant provisions:

(a) A printed provision at the lower right-hand corner of the front of the bill of lading (73a) which states in material part:

> *"In accepting this Bill of Lading, the shipper, consignee,* and/or *the owners of the goods* and the *holder of this Bill of Lading, expressly accept and agree to all its stipulations, conditions* and *exceptions, whether written, printed, stamped or incorporated on the front or back hereof as fully as if they were all signed by such shipper, consignee, owner or holder.* * * *" (Emphasis added.)

(b) A handstamp on the front of the bill of lading (73a) which stated:

> "ALL U.S.A. CARGO WILL BE DISCHARGED AT THE NEAREST NON-U.S. PORT(S) IN EVENT OF THE LONGSHOREMEN STRIKE AT THE U.S. EAST COAST CONTINUES AND CARGO FROM SUCH DISCHARGING PORT(S) TO BILL OF LADING DESTINATIONS ARE AT THE COST AND RISK OF CARGO." And

(c) The following printed provision on the back of the bill of lading (74a) which states in material part:

> "5 *If the loading carriage discharge or delivery is impeded or if there are reasonable grounds for anticipating that the same is or threatens to be impeded by the imminence outbreak or existence of * * * strikes * * * or by absence from any cause of facilities for loading, discharge or delivery the carrier and/or his agents and/or the master may (if in his or their uncontrolled discretion he or they think it advisable) at any time before or after the commencement of the voyage abandon or suspend the voyage, alter or vary or depart from the proposed or advertised or agreed or customary route * * * Anything done or not done by reason of or in compliance with the provisions here and before contained or any of them shall be deemed to be within the contract voyage. * * *"* (Emphasis added.)

Partial Discharge of Cargo at New York

The SINGAPORE TRADER arrived in New York on September 27, 1971 and commenced discharging cargo at the Columbia Street Pier in Brooklyn on September 28, 1971. By midnight September 30, 1971 the ship had discharged only 15%-20% of her cargo (77a), thus leaving approximately 60,000 plus cartons on board.

The International Longshoremen's Association Strike

At midnight on September 30, 1971 the I.L.A. commenced a strike which covered the entire East and Gulf Coasts of the United States. The strike continued for almost two months ending on November 28, 1971 (77a, 78a).

The Shipowner's Options upon the Commencement of the Strike

Upon the commencement of the strike, the shipowner had *two* options:

1. If he could be certain the strike would be of short duration, he could have had the SINGAPORE TRADER remain in New York until the end of the strike and then discharge and deliver the balance of the cargo; or

2. If the strike was likely to be of long duration, then proper care of the cargo and the contract terms obligated the shipowner to re-route the ship to an alternate port where the seasonal goods could be discharged, delivered and returned to New York or other ultimate destination in time to reach the 1971 Christmas market (78a, 273a-277a, 148a-154a).

As matters developed, the shipowner was correctly informed by its local New York port agent, Gannet Freighting, Inc., that the strike was likely to be of long duration (78a) and thus the shipowner chose Option number 2 and commenced *seeking the best alternate port where he could be reasonably certain of discharging and delivering the cargo without risk of further delays.*

All parties agree (and the district court found) that the goods, which were wanted for the 1971 New York Christmas market, could not be discharged and delivered to the consignees in time to make the market unless the SINGAPORE TRADER was ordered to an alternate port where the cargo could be discharged, delivered and returned to New York without further delay (117a, 78a, para. 16(c), 102a, para. 18).

Investigation of the "nearest non-U.S. port(s)"

The nearest non-U.S. port(s) are in Canada. While there are other nearby foreign ports including Bermuda, the Bahamas, Mexico and others (79a), there would be no realistic possibility that the cargo could be returned to New York from these ports in time to reach the 1971 Christmas market and the commercial purpose of the bill of lading contracts could not be achieved in going to such ports.

Thus, observing the handstamp on the bill of lading, the shipowner first investigated the possibility of using the suitable nearby major Canadian ports. The shipowner's local port agent in New York, Gannet Freighting, Inc., obtained the assistance of Colley Motorships Ltd. of Montreal, a reliable ship agent it had used in Canada for many years to canvass the Canadian ports.

After investigating, Colley advised Gannet that the SINGAPORE TRADER's cargo could not be discharged and delivered in any of the suitable major Canadian ports such as Halifax, Saint John, N.B., Quebec and Montreal, because the longshoremen's unions in those ports were affiliated with the I.L.A. and would refuse to handle the SINGAPORE TRADER's "hot cargo." (150a-151a, 155a-156a, 198a-199a, 254a-255a, 229a, 407a-409a.)

After reviewing extensive evidence on the issue, the district court held that the Canadian "I.L.A. affiliated locals would not discharge the vessel" (119a), thereby concluding that the shipowner received accurate information from Gannet and Colley. This was based on the facts.

Thus, acting under Clause 5, the shipowner exercised reasonable discretion to avoid going to the Canadian I.L.A. ports of Saint John, Halifax, Quebec, Montreal, etc. (in sequence as the distance by sea from New York increased). Its sole purpose in doing so, was to avoid the risk of foreseeable long delays at those ports.

The district court specifically approved such action by the shipowner; and the district court correctly rejected cargo's unreasonable arguments that the ship could have and should have been discharged at the Canadian I.L.A. ports by the "ignoble" practice of "forging" the ship's documents, using "fraudulent documents" and taking other surreptitious action in an attempt to deceive the I.L.A. local, and/or international officials. The district court found there were substantial risks of delay to the cargo if such steps failed (117a-119a, 121a-123a). [Clearly the shipowner's action in avoiding the foreseeable long delays or risks thereof at the major Canadian ports was *reasonable* and *prudent*.]

The investigation by Gannet and Colley of a number of minor Canadian ports, which they thought might be able to handle the SINGAPORE TRADER and which did not have I.L.A. labor, *including Valleyfield* (near Montreal) established that such ports were *congested*, they had *inadequate facilities* for the SINGAPORE TRADER's general cargo and there would be *long delays* to the cargo in all such ports (149a-153a, 173a-176a, 291a-292a, 346a-349a, 353a-354a, 366a-373a).

It is significant to note that the district court specifically found that Valleyfield "was congested" and has less efficient facilities than Detroit (119a)—thereby again concluding the shipowner received accurate information from Gannet and Colley. This was based on the facts.

It is also significant to note that Colley advised Gannet that the SINGAPORE TRADER could not be discharged in any Canadian port notwithstanding the fact that by doing so Colley lost a substantial agency fee. If the ship could have been discharged in Montreal (or Valleyfield, which is close to Montreal), Colley would have been her port agent earning a fee of 2% of the inbound freight of approximately $360,000, or approximately $7,200. (354a-356a, Ex. 13-S.) If the ship could have been discharged at any other

Canadian port, Colley would have appointed a sub-agent and shared in the fee. Colley earned no fee when the ship went to Detroit (356a-357a). Mr. Paulsen, of Colley, considered it *"most reasonable"* for the ship to go to Detroit rather than attempt to discharge at any Canadian port (357a). Mr. Honegger, Vice President of Colley, would *not* consider it prudent to bring the ship into any Canadian port, in the circumstances (335a). [Certainly if there had been any reasonable possibility for the SINGAPORE TRADER to have used any Canadian port, Colley, which had a strong financial motive, would have recommended such action.]

The Diversion to Detroit

After correctly determining that there were substantial risks of long delays because of longshoremen labor problems or congested or inadequate facilities at *all* nearby Canadian ports, and thus that no available nearby "non-U.S. port(s)" was suitable for the immediate discharge and delivery of the cargo, the shipowner (through Gannet Freighting, Inc.) then, *and only then*, investigated the Great Lakes ports, including Detroit, and received advice that the SINGAPORE TRADER's cargo could be discharged and delivered there, if the ship arrived promptly (186a-187a).

Detroit has non-I.L.A. labor and there were thus no risks of delays due to labor problems there. Detroit has excellent handling, storage and transportation facilities and it is as close to New York by land as any of the nearby Canadian ports, and there would be *no* delays because of congested or inadequate facilities (79a, 151a-152a). [The district court found that Detroit "was indeed among the best available safe and convenient ports" (117a).]

On October 6, 1971 Gannet recommended to the shipowner that the SINGAPORE TRADER be re-routed to

Detroit as the *"best alternate port"*, considering all the circumstances. Gannet's telex to the shipowner expresses the information available to Gannet and to the shipowner at that time (81a, para. 16(i)). The telex (Ex. 13-X) states in material part:

> "PRES. NIXON HAS INVOKED TAFT HARTLEY ACT INJUNCTION ONLY AGAINST WEST COAST PORTS. WE FEAR THIS ACTION WILL MEAN INDEFINITELY PROLONGED STIPPAGE (SIC) AT NEW YORK. WHILE ALWAYS POSSIBLE THEY MIGHT SETTLE, OUR BEST JUDGEMENT IN LIGHT OF PRESENT FACTS, IS THAT THEY WILL NOT.
>
> CONSEQUENTLY, WE HAVE LOOKED FOR *BEST ALTERNATE PORT* AND HAVE GOT A FIRM COMMITMENT FROM DETROIT HARBOR TERMINAL, DETROIT MICHIGAN. WE RECOMMEND YOU ACCEPT, AND ASSURE YOU THAT WE WOULD TAKE THIS STEP IF VSL WAS OUR OWN, ALSO GIVE SAME RECOMMENDATION TO ANY OTHER OF OUR PRINCIPALS IN SAME SITUATION.
>
> *INSOFAR AS CANADIAN PORTS ARE CONCERNED,* OUR AGENTS HAVE ADVISED AGAIN *THAT ANY SUITABLE PORT SUCH AS ST. JOHN, HALIFAX, MONTREAL, WILL NOT ACCEPT THE VSL A/C UNION PROBLEMS. OTHER, SMALLER CANADIAN PORTS WHO DONT HAVE UNION PROBLEMS ARE HOPELESSLY INADEQUATE IN WAREHOUSE SPACE, TRANSIT FACILITIES, ETC.*
>
> *GREAT LAKES PORTS, CLEVELAND, DETROIT, ETC. DO NOT HAVE I.L.A. LABOR, AND DETROIT CAN ACCEPT VSL. OTHER PORTS ARE OVERCROWDED AND REFUSED."*

* * *

"ACCOUNT NECESSITY TO MAKE CUSTOMS CLEARANCES, ETC. WE MUST HAVE YOUR DECISION WITHOUT FAIL TOMOW MORNING, ORDER TO COMPLETE PREP AND SAIL TOMOW EVENING. *IT IS NEC MAKE EARLIEST POSS ARRIVAL DETROIT AS THAT PORT IS INCREASINGLY CROWDED AND MUST ANSWER STEVEDORE* AIRMAILING TOMOW." (Emphasis added.)

On October 7, 1971, the shipowner telexed Gannet confirming its agreement to re-route the SINGAPORE TRADER to Detroit (82a para. 16(j)).

The SINGAPORE TRADER left New York for Detroit on October 8, 1971. It was estimated she would arrive in Detroit on October 16, 1971 (68a, para. 17).

The Shipowner, In Diverting The SINGAPORE TRADER To Detroit, Had *No* Motive Other Than To Deliver Her Christmas Cargo At The Best Alternate Port In Time To Reach The 1971 Market.

The district court's findings that the SINGAPORE TRADER was ordered to Detroit "at least in part" for the shipowner's "economic convenience" (102a, para. 11, 116a, 82a, para. 16(j)) is clearly erroneous.

This mistaken finding is apparently based on a comment in a telex (Ex. 13X), where the shipowner's New York port agent, Gannet, reported that the discharging costs at Detroit would be less than at New York, although offset by seaway tolls, fittings, bunkers, etc., and Gannet stated "* * * We believe net result will be to your advantage financially." (180a-181a, 190a-193a.) The district court emphasized *Gannet's belief* regarding a possible net financial advantage to the shipowner (115a-116a), and improperly disregarded the balance of the evidence on the point. [The district court also incorrectly stated the facts concerning

an alleged "steady stream of complaints" (113a) about the discharging costs at New York. The shipowner raised only one objection (Ex. 13-J), and the discharging cost was ultimately negotiated at a rate lower than Gannet initially estimated (Exs. 13-K, L)].

Except for the I.L.A. strike, it is uncontradicted that the SINGAPORE TRADER would have remained in New York and completed discharging her cargo regardless of the discharging costs or any other fact. The shipowner had no other option. Further, the telex messages show the shipowner intended to send additional ships to New York from the Far East (Exs. 13-O, 13-T). [Thus the costs at New York could *not* have been so material a factor as the district court assumed.]

It is uncontradicted that a savings at Detroit was *incidental only* and *did not* influence the choice of alternate port (192a-193a).

Upon the commencement of the strike, the ship had to leave New York. And—on uncontradicted evidence—the discharging costs, at *all Canadian ports* investigated as potential alternate ports, were far lower than New York (initially estimated at $20.00 per ton, Ex. 13-I, and revised to $18.00 per ton, Exs. 13-L, 13-X) and equal to or lower than Detroit ($12.95 per ton, Ex. 13-X). At the major Canadian ports the cost would have been $10.00-$13.00 per ton (375a-376a). At Valleyfield the rate was only $7.50 to $8.00 (451a).

Thus, *no matter what alternate port* was chosen, the shipowner would have received an incidental financial benefit in lower discharging costs than at New York.

Certainly, if lower discharging costs had played any part in the choice of an alternate port (which they did not)—reason as well as the PROFIT MOTIVE—dictates the shipowner would have (if otherwise possible) chosen a Cana-

dian port—at all of which, in addition to greater savings on discharging costs than Detroit, the shipowner would have enjoyed savings in the form of reduced voyage expenses. The voyage to all Canadian ports from New York is shorter than the voyage to Detroit.

But the relative costs between Detroit and the Canadian ports played *no* part in the choice of alternate port. After the Canadian ports were ruled out because of risk of long delays and it became clear that Detroit was the best alternate port, and most importantly (151a), would accept the ship, the rate at Detroit was negotiated. This occurred after the strike commenced at New York (190a-193a, 282a-283a).

Mr. Herlihy of Gannet was closely questioned on the point, including by the district court.

By Mr. Bowles:

> "Q. As to your own knowledge, did the cost of stevedoring in New York have anything to do with going to Detroit?
>
> A. *No, it had no bearing.*
>
> THE COURT: Didn't you say you saved enough on stevedoring at Detroit to justify his bunkers and its time delay and his tolls on the Seaway for getting to Detroit?
>
> THE WITNESS: The arithmetic worked out that way, but you see the rate actually, the New York rate is negotiated from the $20 estimate down to about $18.
>
> THE COURT: Even at 18, did it pay you to go to Detroit?
>
> THE WITNESS: No, sir. That is the New York actual price paid. The Detroit stevedore quoted me $13 and based on what was remaining on the ship to be discharged at Detroit would be charged at the

lower rate. He had already paid $5,000 discharging in New York. *But if the point ... that did we pick Detroit as a low rate as opposed to New York, no, sir. We picked Detroit as the port where we could work the vessel and then got a rate from them.*

Q. Mr. Herlihy, at what point in time did you negotiate the rate for Detroit; what date? Was that before or after the strike commenced?

A. *After.*" (192a-193a.) (Emphasis added.)

Similarly, if the shipowner had obtained a return cargo at any Canadian port—that would have been a further incentive to choose a Canadian port instead of Detroit.

The district court correctly found that prior to diverting the SINGAPORE TRADER to Detroit, no commitments had been made for a return cargo to the Far East. (141a-143a, Pl. Exs. 13 F, J and L.) And that *after* the SINGAPORE TRADER was diverted to Detroit, the shipowner made some efforts and had some hope of obtaining a return cargo in Saint John or other Canadian port. (See telex dated October 11, 1971 Pl. Ex. 13 AA, eighth paragraph; 280-283a.) But no commitments for a return cargo were ever made. (161a, 83a, para. 17d, 17e.)

We respectfully submit that when this court reviews the entire record, it will be left with a definite and firm conviction that a mistake has been committed in that *unquestionably* the district court clearly erred regarding the shipowner's motive in diverting the SINGAPORE TRADER to Detroit. *McAllister* v. *United States*, 348 U.S. 19, 20 (1954). This court should hold that economic considerations played *no* part in the choice of alternate port; and that the *sole* motive was that based on the advice of experienced local agents, the shipowner justifiably concluded that Detroit was the best alternate port to deliver the SINGAPORE TRADER's Christmas cargo in time to reach the

market—without risk of long delays from strikes at the Canadian I.L.A. ports or from congested and inadequate facilities at unsuitable ports such as Valleyfield. The diversion to Detroit was intended to benefit cargo.

Notice To The Cargo Owners And Absence Of Protest

At about the time the SINGAPORE TRADER left New York, Gannet mailed notices of the re-routing of the SINGAPORE TRADER to Detroit to all the "notify" parties on the bills of lading (Ex. 14, 159a).

Approximately 250 notices were mailed to the "notify" parties with respect to the 472 bills of lading issued to the cargo interests. The shipowner could not know the real party in interest on each bill of lading, some of which were in negotiable form (116a). See for example the sample bill (73a), the real party in interest is *not* identified. The shipowner notified the only persons he could under the circumstances. Persons in the business of freight forwarding would be expected to understand the situation and to promptly notify the real parties in interest accordingly.

The shipowner contends it was impractical to consult with the 472 cargo interests prior to the time the ship left for Detroit. Apart from the fact that there simply was no time—it is the shipowner's obligation to properly control the voyage. He did so! It was essential that prompt action be taken to obtain a suitable alternate port—and Detroit was available only on condition that the ship arrive promptly because of increasing congestion at Detroit (186a-187a, Ex. 13-X).

The shipowner contends that the cargo interests had notice of the re-routing shortly after the SINGAPORE TRADER left New York and before the cargo interests received notice of the stranding. Although challenged to do so, the cargo owners introduced no evidence as to when the notices were actually received (264a). The district

court found that "In no event was the notice received earlier than Monday, October 11, 1971 * * *" (116a). This was before the stranding.

But in any event, no cargo interests *ever* informed Gannet in writing or otherwise prior to the stranding of the SINGAPORE TRADER that it protested the re-routing of the SINGAPORE TRADER to Detroit as an unreasonable deviation in violation of the contract or that it thereby considered the contract terminated (82a, para. 17b). And for good reason. They recognized that discharge at Detroit under the circumstances was in their interests.

The Stranding

On October 15, 1971, at 0420 hours the SINGAPORE TRADER stranded in the St. Lawrence River while enroute to Detroit. After reviewing all of the evidence (108a-111a, 66a-70a, 83a-94a), the district court properly found that the stranding was caused by an error or errors in navigation by the watch officer of the SINGAPORE TRADER in failing to keep the vessel on the course set by the pilot, in failing to seek the advice of the pilot by asking him to return to the bridge when he should have realized the vessel was heading into shoal water and leaving the shipping channel shown on the charts or that alternatively, possibly the pilot set the wrong course initially. The district court stated: "Indeed a more classic case of 'Act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation . . . of the ship' is difficult to postulate" (111a). The district court reviewed numerous allegations of unseaworthiness raised by the cargo interests and properly rejected all such arguments (110a-111a).

Except for the erroneous conclusion of unreasonable deviation, clearly the shipowner would have been exonerated from liability to cargo under COGSA, 46 U.S.C. § 1304 (2)(a).

Summary of Argument

The district court's conclusion that the SINGAPORE TRADER "deviated" in going to Detroit instead of to the congested non-U.S. port of Valleyfield, stems from the district court's interpretation that the rubber stamp on the front of the bill of lading contracts "* * * limits the printed liberties clause in § 5 of the Bill * * *" and "* * * represents an agreement or contractual obligation to discharge cargo, at carrier's cost, at the *nearest feasible non-U.S. port* * * *" (emphasis the district court's), (112a-113a, 101a para. 4; 118a, 120a).

In essence, we submit, the district court held that after the I.L.A. strike closed New York, the ship was absolutely bound to go to a non-U.S. port—here the congested port of Valleyfield—regardless of the consequential foreseeable long delays at Valleyfield. An illogical result! This interpretation is erroneous as a matter of law, *infra*, pp. 22-25.

The district court's conclusion that the deviation was "unreasonable," stems from an incorrect conception of the applicable law. He considered only the following points:

(a) that going to Detroit was at least in part for the economic convenience of the shipowner [a clearly erroneous finding, *supra*, pp. 13-17];

(b) the additional distance to Detroit and the perils of using the Saint Lawrence Seaway (121a) [the nominal risks in using this major traffic route are of no significance in comparison to the benefits to cargo in going to Detroit, *infra*, p. 37];

(c) the risks in attempting to use the Canadian I.L.A. ports [which unreasonable argument by cargo the district court correctly rejected, *supra*, pp. 9-11]; and

(d) that it was "feasible" to discharge cargo at Valleyfield [apparently in the sense that Valleyfield could be entered without committing forgery (120a)—and apparently overlooking his prior findings that Valleyfield "was congested" and had less efficient facilities than Detroit, *infra,* pp. 37-39].

We submit that the district court applied improper standards in concluding that the deviation (if any) was unreasonable. Primarily, the district court, as a matter of hindsight, emphasized the allegedly negative aspects of the diversion to Detroit—improperly giving *no* weight to the fact that the shipowner acted on the accurate information and advice of reliable local agents; there was no fault or negligence on the part of the shipowner, and the diversion was in cargo's interest in that it would achieve the commercial purpose of the parties to the transaction, *infra,* pp. 21-39.

The shipowner contends that the diversion of the SINGAPORE TRADER from New York to Detroit was *not* a deviation. It was a proper alternate or substituted method of performance permitted, if not required, by the contract, and the law. Alternatively, on consideration of proper legal standards, it was a reasonable deviation—it benefited cargo. In any event it was waived by the cargo interests.

Under COGSA, 46 U.S.C. § 1304(2)(a) and (j), the shipowner is entitled to exoneration from liability to the cargo owners because the ship's stranding resulted from an error or errors in navigation by her mariners, and the diversion to Detroit was caused by the I.L.A. strike. The shipowner is also entitled to judgment on its counterclaims for general average contributions and freight. Alternatively the shipowner is entitled to limitation of liability under 46 U.S.C. § 183 *et seq.*

POINT I

As a matter of law, in determining whether there was a deviation, and if so, whether it was *reasonable*, the court must consider all relevant circumstances existing at the time including:

> ***All* the terms of the contract;**
>
> **The interests of *all* parties concerned;**
>
> **The *motive* for the alleged deviation—whether to benefit the shipowner, or cargo or both jointly—and whether the commercial purpose of the transaction was to be achieved; and**
>
> **Whether the shipowner was guilty of fault or negligence in making the alleged deviation or whether he acted prudently.**

The district court did *not* apply these proper standards, and thus *incorrectly* concluded that the SINGAPORE TRADER "unreasonably" deviated when she diverted to Detroit—instead of to the congested port of Valleyfield—upon the commencement of the I.L.A. strike at New York.

This court has approved the following test for determining the "reasonableness" of an alleged deviation:

> "The true test seems to be what departure from the contract voyage might a prudent person controlling the voyage at the time make and maintain, having in mind all the relevant circumstances existing at the time, including the terms of the contract without obligation to consider the interests of any one as conclusive."

Irwin Feuer v. *Booth Steamship Company,* 195 F.2d 529-1 (2 Cir. 1952), affirming *American Cyanamid Company* v. *Booth Steamship Company,* 99 F.Supp. 232, 237 (S.D.N.Y. 1951), adopting the test approved by the House of Lords in *Stag Line Ltd.* v. *Foscolo, Mango and Company,* [1932] A.C. 328, 343-344.

When the shipowner's actions are viewed in light of these proper legal standards, we submit that the only logical conclusion is that either the SINGAPORE TRADER did *not* deviate or that the deviation, if any, *was reasonable.*

A. Properly interpreted, considering all the existing circumstances, the bill of lading contract terms authorized (if they did not require) the diversion to Detroit. Accordingly *no* deviation occurred.

1. *The district court erred in interpreting the contract in such manner as to exclude Clause 5.*

As a matter of law, a contract must be read, construed, interpreted, or considered as a whole, or in its entirety. The intended purpose of the parties to a contract is to be ascertained from the entire instrument and not from detached or isolated portions. All parts of the contract must be given force, effect and meaning, if possible. Apparently conflicting provisions must be reconciled, if possible.

The rule is that:

> "the court will, if possible, give effect to all parts of the instrument, and an interpretation which gives a reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable."

Curacao Trading Co. v. *Federal Ins. Co.,* 50 F. Supp. 441, 444 (S.D.N.Y. 1942), citing *Williston on Contracts* § 619. See also 17A C.J.S., Contracts §§ 297, 309; and the numerous cases cited in above authorities.

In addition to the ordinary rules of contract interpretation, the bill of lading terms must also be considered in light of the overriding obligations of COGSA—particularly the shipowner's obligation to properly care for the cargo. 46 USC 1303(2). *Gilmore & Black, The Law of Admiralty,* (2nd Ed) § 3.25; *W.R. Grace & Co.* v. *Toyo Kisen Kabushiki Kaisha,* 7 F.2d 889, 891 (N.D. Cal. 1925), aff'd, 12 F.2d 519 (9 Cir. 1926); *Crelinsten Fruit Company* v. *The MORMACSAGA,* [1968] 2 Lloyd's List 184, 190-191 (Canada, Exchequer Court, Quebec).

Unquestionably the *real* and indeed, *only purpose* intended by the parties to this contract, was to have the SINGAPORE TRADER's cargo of Christmas goods discharged at the best alternate port and returned to New York in time to reach the 1971 market after the I.L.A. shut down all cargo operations on the East and Gulf Coasts of the United States.

There was no point in going to any foreign port *per se*—or for that matter going to any alternate port (U.S. *or* non-U.S.)—unless such action would achieve the commercial purpose of the parties to the transaction.

That this is true is well illustrated by the following hypothetical situation. Assume that through some quirk a nearby U.S. port, say Boston or Philadelphia, remained open while all other East and Gulf Coast ports were closed by the strike. Would any court hold that the ship unreasonably deviated in going to such nearby U.S. port instead of to a more distant foreign port? Of course not! The shipowner would be permitted to exercise reasonable discretion under Clause 5 and use the U.S. port in those circumstances —because there would be no point in going to any foreign port—when the use of the nearby U.S. port would better serve the interests of all parties to the contract—particularly cargo's interests.

We submit there is no real conflict between the hand stamp and Clause 5, both of which clauses were expressly accepted by the bill of lading holders, *supra,* p. 6, para. (a). And we submit that proper interpretation of the contract requires that the two clauses be read together, as follows: With New York and all nearby U.S. ports closed because of the I.L.A. strike, the next nearest potential—reasonable—alternate ports are in Canada (Halifax, Saint John, etc.). The hand stamp permits or indeed requires the use of the nearest of those ports—if and only if—such use would serve the interests of the parties to the contract. If the use of any alternate port would cause delay and would frustrate the purpose of the parties to the contract, then Clause 5 permits or requires the exercise of discretion to go to the next alternate port—*"If the * * * discharge or delivery is impeded" or if the shipowner has "* * * reasonable grounds for anticipating that the same is or threatens to be impeded by the imminence outbreak or existence of * * * strikes * * * or by absence from any cause of facilities for loading discharge or delivery * * *"* (74a, Emphasis added).

The district court specifically *approved* the shipowner's exercise of discretion under Clause 5 to avoid the foreseeable long delays at the Canadian I.L.A. ports of Halifax, etc., which would have clearly frustrated the purpose of the contract, *supra,* pp. 9-11.

Long delay due to congestion and inadequate facilities was also foreseen by the shipowner at Valleyfield and other minor unsuitable Canadian ports, *supra,* pp. 10-13; and we submit the shipowner exercised reasonable discretion under Clause 5 in choosing Detroit instead of Valleyfield, etc.—because the use of Detroit would obviously better serve the interests of cargo—in avoiding the foreseeable long delays and risks thereof at Valleyfield.

By isolating the hand stamp from the balance of the contract, the district court apparently determined that the

parties had an intent to go to a non-U.S. port *per se*. We submit this is elevating form over substance. And as a matter of law, this interpretation is erroneous because it led the district court to illogically conclude that the SINGAPORE TRADER was absolutely bound to enter the *congested* port of Valleyfield—which port also *had less efficient facilities* than Detroit. We submit the real purpose or intent of the parties to the contract—to promptly return the Christmas goods to New York—would have been frustrated if such course or action had been followed. (Indeed, if such course of action had been followed, and the Christmas cargo delayed in reaching the market—these same cargo interests would be arguing the ship "unreasonably" deviated in not going to Detroit where there would have been no delays.)

A construction leading to an absurd or unusual result should be avoided. WILLISTON ON CONTRACTS § 620; 17A C.J.S., CONTRACTS § 319; and the numerous cases cited in the above authorities.

This court should hold that the district court erred as a matter of law in excluding Clause 5 from the contract. Except for this error, the district court would have concluded that discharge at Detroit was "reasonably authorized in the contract" (112a, 117a, 119-120a).

2. *The courts have held that when delays are foreseeable, a shipowner has not only the right but the duty under the "Liberties Clause" (similar to Clause 5) to alter the voyage in order to properly care for the cargo under COGSA, 46 U.S.C. § 1303(2).*

In *Crelinsten Fruit Company* v. *The MORMACSAGA*, [1968] 2 Lloyd's List 184, 190-191 (Canada), the Exchequer Court, Quebec, held the defendant steamship liable for damage to plaintiff's cargo of oranges caused by a 50-day delay in the port of Jacksonville, Florida because of a

seamen's strike. The MORMACSAGA had sailed from Brazilian ports on its customary route which included Jacksonville, other U.S. East Coast ports and finally Montreal. The defendants admitted that they knew prior to the time the ship entered Jacksonville that its American unionized deck officers, radio operator and crew members would walk off the ship. Notwithstanding this knowledge, the owner permitted the vessel to enter Jacksonville where the crew immediately left the ship. The ship and its cargo were strikebound for 50 days, resulting in damage to plaintiff's oranges.

The court noted at p. 190 that the bills of lading contained the usual liberties clause which would have permitted the ship to proceed directly to Montreal instead of entering the port of Jacksonville. And at p. 191 the court held:

> "In the circumstances the Court finds that *the defendants* and their representatives, by entering Jacksonville rather than proceeding directly to Montreal *failed to act with reasonable care and prudence and with proper regard to the preservation of the plaintiff's shipment of oranges.*" (Emphasis added.)

Here, proper care of this seasonal cargo *required* the shipowner to exercise discretion under Clause 5 to alter the voyage to avoid the foreseeable long delays at all Canadian ports.

3. *The courts have consistently held that ships have* not deviated *under "Liberties Clauses" (similar to Clause 5) in cases where shipowners have prudently diverted their ships to avoid foreseeable delays.*

In *Kroll* v. *Silverline Ltd.*, 116 F. Supp. 443, 445-446 (N.D. Cal. S.D. 1953), cargo was loaded at Calcutta and scheduled to be discharged at Los Angeles under bills of lading which contained provisions similar to Clause 5 in the SINGAPORE TRADER's bill of lading. The district

court held it was reasonable to deliver the cargo at Tacoma, Washington, as the nearest "open" port to Los Angeles, which was closed with other ports by the general maritime strike of 1948. The court found it unnecessary to resort to COGSA's terms since the contract expressly sanctioned an alternate place of delivery in the event of labor trouble and held that there *was no deviation.* The libelants were denied recovery of their costs in transporting the cargo from Tacoma to Los Angeles.

Facts strikingly similar to the case at hand were presented to the House of Lords in *G. H. Renton & Co., Ltd.* v. *Palmyra Trading Corporation (The CASPIANA),* [1956] 2 Lloyd's List 379, 391. In that case a cargo of lumber was being carried from Canadian ports to London and Hull in the steamship CASPIANA under bills of lading which contained clauses 14(e) and 14(f), which were similar to Clause 5 here. While the CASPIANA was enroute to her discharge ports, the London dockworkers went on strike. Although other United Kingdom ports were not strike-bound as such, dockworkers at all *major** United Kingdom ports, including Hull, and some continental ports, while freely unloading cargo originally destined to their respective ports, refused to unload "hot cargo" diverted to their ports from London.

In order to avoid foreseeable delays, the CASPIANA's owners ordered her to Hamburg where the London and Hull cargo was discharged. The defendant shipowner took no steps to forward or trans-ship the cargo from Hamburg to London and Hull.

The trial court gave judgment for plaintiffs, concluding in part that the bill of lading clauses were invalid under

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* No consideration was given to discharging at minor out-ports. Similarly no weight should be given to the fact that the SINGAPORE TRADER did not discharge her cargo at minor out-ports such as Valleyfield—even if they were *not* congested etc., which they were!

the Hague Rules (similar to COGSA). The Court of Appeal reversed and held that the bill of lading clauses should not be regarded as giving liberty to deviate but rather as providing, in the circumstances particularly envisaged, an agreed *substituted method of performance of the contract of carriage;* that in proceeding to Hamburg as *a convenient* port, the ship was acting in accordance with the contract of carriage *and that what she did was to be regarded as performance of the contract of carriage.* The House of Lords affirmed, and Lord Morton held at page 391:

> "Counsel submits that a contract cannot validly permit deviations which are not covered by that rule [Hague Rules, Article IV r.4]. In my opinion even if this submission is correct, as to which I express no opinion, the provisions of Clause 14(c) and (f) [the Liberties Clause] are not provisions which permit deviations. As I have already said, they provide *substituted ways of performing the contract in certain events;* consequently, if the master performs the contract in any of these ways, *he is not deviating.*" (Emphasis added.)

Lord Morton cited and relied upon *Kroll, supra,* p. 26 and *Hirsch Lumber Co.* v. *Weyerhaeuser Steamship Company,* 233 F.2d 791 (2 Cir. 1956) discussed, *infra,* pp. 34-35.

Here the shipowner was informed by a reliable, accurate, source that long delays could be expected at *all* Canadian ports. The shipowner contends that, under Clause 5 of the bill of lading contract, this information constituted "reasonable grounds for anticipating" that the discharge or delivery of the cargo would be "impeded" permitting (if not requiring) altering the voyage to Detroit.

As pointed out in *Kroll, supra,* p. 26, *The CASPIANA, supra,* p. 27, and *Booth Steamship, infra,* p. 35, the provisions of COGSA that

> "any reasonable deviation shall not be deemed to be an infringement or breach of this chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom * * *." 46 U.S.C. § 1304(4)

do not require consideration unless the court first decides that there has been a deviation. If the voyage has been performed within the framework of the bill of lading contract—without a deviation—the court need not consider the "reasonableness" of the course of action.

Here, considering all the circumstances, the diversion to Detroit was permitted (if not required) by the bill of lading contract. This court should conclude *there was no deviation.*

B. On consideration of proper legal standards—unquestionably—the deviation (if any), was reasonable.*

1. *The harsh doctrine of unreasonable deviation is only applied when the shipowner's deliberate, voluntary action is criticized by a court as a "fault," or "grossly negligent" or "without maritime necessity" or benefits the shipowner alone. There is no basis for applying the doctrine here.*

The harsh effect of an "unreasonable deviation" strips the shipowner of all defenses provided by Congress in COGSA and in the bill of lading. No other breach of contract has so drastic an effect.

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* As with conclusions of unseaworthiness and negligence (or lack of negligence), we submit the district court's conclusion of "unreasonable deviation" is *not* protected by the "unless clearly erroneous" test of F.R.C.P. 52(a), it is reviewable as a matter of law. *Erie Lackawanna Railway Co.* v. *Timpany*, 495 F.2d 830, 833 (2 Cir. 1974); *In re Marine Sulphur Queen*, 460 F.2d 89, 97 (2 Cir. 1972), cert. denied 409 U.S. 982 (1972).

So far as we can determine, in every adjudicated case in which "unreasonable deviation" has been found, the deliberate, voluntary action complained of has been criticized by the court as a "fault" or "grossly negligent" or "without maritime necessity" or the action benefits the shipowner alone—usually having the ship call at ports not permitted by the contract, with no motive other than to increase the shipowner's revenues. None of this existed here.

In *The Indrapura,* 171 Fed. 929, 938 (D.C. Ore. 1909), the court characterized the action of the shipowner as a "fault" where the shipowner had ordered the ship into a drydock to have her bottom painted, after loading her cargo. The evidence established there was no "maritime necessity," but only the shipowner's convenience, for ordering the ship into drydock at that time for that purpose. The shipowner was held liable for the cargo which was destroyed in a fire while the ship was on the drydock.

In *P. & E. Shipping Corp.* v. *Empresa Cubana Export. E Import.,* 335 F.2d 678, 679 (1 Cir. 1964), a ship had loaded perishable foodstuffs in the United States and Canada destined for Havana. After departing Saint John, New Brunswick, the ship proceeded on a zig-zag course, first to New York, then to Bermuda, and then to San Juan where the cargo was discharged. The shipowner contended that relations between the U.S. and Cuba had deteriorated and he could not safely discharge the cargo in Cuba. The court held there was no sufficient justification for not going to Havana and that in any event the shipowner was "grossly negligent" for not discharging the cargo at one of the several foreign ports which were much closer to Havana than San Juan.

In *World Wide Steamship Co.* v. *India Supply Mission,* 316 F. Supp. 190 (S.D.N.Y. 1970) the court held the action

of a shipowner "unreasonable" where on a voyage from the United States to India, the ship deviated to Greece "purely for the purpose of lifting additional cargo." The deviation caused a delay of three days and when the ship ultimately proceeded through the Suez Canal, she ran into an unprecedented fog and stranded. The court stressed that the deviation was unreasonable because it benefited *only* the shipowner. See also *United Nations Children's Fund* v. *S.S. Nordstern*, 251 F. Supp. 833 (S.D.N.Y. 1965); and *Surrendra (Overseas) Private, Ltd.* v. *SS Hellenic Hero*, 213 F. Supp. 97, aff'd 324 F.2d 955 (2 Cir. 1963)—(both involving change of port *solely* for the shipowner's business purposes).

In *Stag Line, Ltd.* v. *Foscolo, Mango and Company* [1932] A.C. 328, the IXIA stranded after deviating from her course to disembark several engineers who had been working on the ship's propulsion machinery. The deviation was held unreasonable solely because it benefited *only* the shipowner and *not cargo.*

2. *Here the shipowner's actions were in all respects reasonable, prudent and in good faith. No fault or negligence existed.*

It is significant to note that there is not one iota of criticism by the district court of the shipowner or his agents, Gannet or Colley, regarding the investigation of alternate ports or the advice the agents gave to the shipowner. Absolutely *no fault or negligence* on their part existed.

Indeed the district court found that "Gannet *made good faith* efforts . . . to ascertain conditions in Canada"; that Gannet "*acted reasonably* in reporting to its principal" (the shipowner); and that "the owner relied on Gannet in instructing the Master to proceed to Detroit" (120a). Numerous specific findings by the district court show the ac-

curacy of Gannet's and Colley's information and recommendations.

We submit the shipowner acted in a reasonable and prudent manner in seeking the advice of experienced and reliable businessmen who were familiar with local conditions, and then in acting on their recommendations to avoid the foreseeable long delays or risks thereof at all Canadian ports.

The court must put itself in the position of the actors in the transaction under the existing circumstances. And whether the actors exercise reasonable discretion must be considered in light of all the facts available to the actors at the time and place. The action taken cannot be judged on hindsight.

In *The Styria*, 186 U.S. 1 (1902), the Styria's master, with the concurrence of the owner's agent, having just loaded a cargo of sulphur consigned to New York discharged it at its Sicilian loading port on learning of the war between the United States and Spain and that sulphur was on the Spanish contraband list. The master was charged with knowledge of news reports to the effect that there were negotiations with Spain to permit the free carriage of sulphur. It later turned out that the reports were true, that the negotiations were successful and that *not a single* sulphur ship was seized by Spain during the entire war. Nevertheless, the court held proper the discharge of the sulphur and that the action taken could not be judged in the light of "knowledge gained after the event" or "knowledge of subsequent events" (186 U.S. 13, 22); but the court must put itself in the position of the actors in the transaction. So tested, the master's conduct was held to be "a reasonable exercise of judgment." What those concerned have a right to demand is "not an infallible, but a

deliberate and considerate judgment," (186 U.S. 9, 10). The actors "conduct is to be judged not in the light of exact knowledge acquired after the event, but by such information as may have been available for him at the time and place" (186 U.S. 15). See also *The Wildwood*, 133 F.2d 765 (9 Cir. 1943).

Here, the shipowner's decision to go to Detroit—and avoid the foreseeable long delays at all Canadian ports—was based on a "deliberate and considerate judgment" of all the existing facts. It was the act of a *reasonable* and *prudent* shipowner.

3. *Here, the sole motive for the diversion benefited cargo. Detroit was the best alternate port at which the shipowner could be reasonably certain of promptly delivering the Christmas cargo in time to reach the 1971 market —without the long delays or risks thereof foreseen at all Canadian ports.*

Disregarding the alleged motive of financial benefit to the shipowner, which has been established as "clearly erroneous," *supra*, p. 13, it becomes perfectly clear that the shipowner's *sole* motive in diverting the SINGAPORE TRADER to Detroit was to benefit cargo.

Considering all the circumstances, the shipowner was justified in concluding that Detroit was the *best alternate port* at which he could be reasonably certain of discharging and delivering the Christmas cargo in time to reach the 1971 market—without the long delays or risk thereof at all Canadian ports. No other reasons for the diversion existed.

On the other hand the shipowner suffered several detriments in going to Detroit in the form of increased voyage time and expense and the shipowner's Canadian sub-agent Colley lost a substantial agency fee when the ship could not reasonably use any Canadian port, *supra*, pp. 10-11.

In *Hirsch Lumber Co.* v. *Weyerhaeuser Steamship Co.*, 233 F.2d 791 (2 Cir. 1956), which has many similarities to the SINGAPORE TRADER, the plaintiff cargo owners were denied recovery of freight and the cost of transporting their cargo of lumber from Baltimore to Port Newark, the contract port of destination. Defendant Weyerhaeuser established that striking lumber handling workers would have prevented discharging the ship at Port Newark or elsewhere in the port of New York. The plaintiffs introduced some evidence that the cargo could have been discharged in Brooklyn. After all of Weyerhaeuser's attempts to find a means of unloading the cargo in Newark or the Port of New York failed, it learned that labor in Baltimore would not honor pickets from Port Newark and directed the ship to Baltimore where the cargo was discharged.

The bills of lading in question contained clauses similar to Clause 5 in the SINGAPORE TRADER bills of lading.

This court at 233 F.2d 795 stated:

> "Judge Leibell fairly and correctly left to the jury the reasonableness of Weyerhaeuser's discharge of the lumber at Baltimore. After summarizing the pertinent provisions of the bills of lading and the sections of the Act, including that which provided that a deviation to unload cargo was *prima facie* to be regarded as unreasonable, he charged that 'the propriety of the deviation is a fact question of inherent reasonableness depending on *all* the surrounding circumstances' and after summarizing the evidence he charged:
>
> *'If you conclude that the carrier was justified in deciding that it could not make the delivery in Port Newark or the Port of New York and that Baltimore was the nearest port at which the carrier could be*

reasonably sure of making delivery, then the deviation in the voyage of the WESTERN TRADER from New York to Baltimore was reasonable and proper, or you may so conclude.'

And he again charged as to burden of proof that it was upon the defendant 'to show that the deviation was reasonable under all the circumstances * * * by a fair preponderance of the evidence.' After the conclusion of the main charge, and at the plaintiff's request, this instruction as to the burden of proof was repeated by the Court.

Thus, after a clear, careful and thorough charge from the Court, the jury found for the defendant. There was ample evidence to justify their verdict and the judgment is affirmed." (Emphasis added.)

Similarly, the shipowner here was fully justified in using Detroit, considering *all* the circumstances.

4. *Deviations which are made for the benefit of cargo or for the joint benefit of ship and cargo are* reasonable.

In *American Cyanamid Co.* v. *The Booth Steamship Co.*, 99 F. Supp. 232 (S.D.N.Y. 1951), aff'd *sub nom, Irwin Feuer* v. *The Booth Steamship Co.*, 195 F.2d 529-1 (2 Cir. 1952), the WESTPOINT stranded because of an error in navigation with loss of all of her cargo. Cargo claimed unreasonable deviation because the ship called at the South American ports of Tutoya and Fortaleza out of their geographical order (extending the distance the ship traveled—but ultimately shortening the voyage), the purpose of which was to catch the spring tides at Tutoya. The district court analyzed the contract and the facts and held their were *no deviations* because the actions were permitted by the bill of lading contracts. With respect to the

claim that calling at Tutoya and Fortaleza out of their geographical order was an unreasonable deviation, the court said at page 236:

> "If I am wrong, and if the Tutoya-Fortaleza course did constitute a deviation, the Carriage of Goods by Sea Act would then come into operation."

Judge McGohey concluded that if there was a deviation, it was *a reasonable* one *which served the interests of both* the *shipowner* and *the cargo owners* because it shortened the course of the voyage. He held, 99 F. Supp. 236:

> "I find that the vessel proceeded to Tutoya first in order to catch the spring tides so that she might safely pass over the bar at Tutoya Bay and that *this was done in order to decrease the elapsed time of the voyage from Bahia to New York.* That the achievement of *this purpose would benefit the shippers* as well as the ship and *was for the purpose of the voyage* seems to me to be obvious." (Emphasis added.)

Booth Steamship was followed in *E.C.L. Sporting Goods* v. *United States Lines, Inc.*, 317 F. Supp. 1245, 1248 (D. Mass. 1969).

Here the voyage to Detroit was slightly longer than the voyage to Canadian ports—but the purpose was to avoid the foreseeable long delays to cargo at all of the Canadian ports, ultimately decreasing the time to return the cargo to New York—and benefiting cargo.

Thus, even if the shipowner's motive was "in part" to benefit himself (which it was not, *supra*, p. 13), the fact that the purpose also benefited cargo makes the deviation (if any) reasonable.

5. *Additional Comments.*

Since the diversion here was made for cargo's benefit, the fact the voyage would be extended slightly (from Valleyfield to Detroit, a voyage of about two days) is of no significance. The St. Lawrence Seaway is a major international seaway; and as the district court noted, many tons of shipping travel the Seaway with minimum loss of life and property (121a). We submit that the slight risk to the cargo on the ship's short additional voyage is far outweighed by the benefit to cargo in having the cargo discharged and delivered without any delays at Detroit.

The district court noted that it would be "feasible" to discharge cargo at Valleyfield (119a), but did not explain the meaning of that term in relation to his findings on the congested nature of the port and/or the facts concerning the relative inefficiency of Valleyfield's facilities. Apparently the term relates back to the district court's erroneous interpretation of the contract, because he said (120a):

> "Here, however the parties had specifically contracted for discharge at 'non-U.S. port(s)', and to pass any such port if it were safe and suitable and could be entered without committing forgery, represented a deviation."

Thus, apparently "feasible" meant possible in the sense that the ship could enter the port and be discharged ultimately without labor strikes—even though there would be a long delay because of congestion and relatively inefficient facilities.

The district court apparently influenced by the fact that another strikebound ship, the DAGRUN, discharged her cargo at Valleyfield (122a). But the district court wholly

overlooked the fact that the DAGRUN's cargo of automobiles—which did not require protected storage—could be and was landed on an *open* pier (349a-350a). The DAGRUN's automobiles were consigned to one cargo owner and did not require time-consuming sorting in covered sheds of 60,000-plus paper cartons among 472 bills of lading as did the SINGAPORE TRADER's cargo. Thus the fact that only *one* strikebound vessel, the *DAGRUN*, discharged her cargo on an open dock in Valleyfield can be given no weight in considering the SINGAPORE TRADER's situation.

The district court also found that *Valleyfield had less efficient facilities than Detroit* (119a). The shipowner submits this is an understatement.

At Detroit the SINGAPORE TRADER would have used the facilities of Detroit Harbor Terminals, the largest modern cargo handling facility in Detroit. It has a full staff of professional longshoremen, large shed space; it is in the U.S., it has excellent rail and road communications with New York; and the distance by land from Detroit to New York is not significantly different than from the Canadian ports to New York (117a, 151a-152a).

Valleyfield handles primarily bulk cargo. The labor force consisted of approximately 50 regular men. Unemployed farmers and other available laborers fill out the staff when necessary. Valleyfield has only two ship berths, and if the two ships are in port, the experienced men are divided between the two. In October 1971 Valleyfield had only one crane; Valleyfield has less truck lines than Detroit and only one rail spur to the harbor (443a, 446a-447a, 449a, 451a-452a).

There is no reasonable question that Detroit would have been a far more suitable port for the SINGAPORE TRAD-

ER and her cargo than Valleyfield—*even apart from the fact that Valleyfield was congested.*

We have respectfully submitted that the district court's interpretation of the contract was erroneous as a matter of law, *supra,* pp. 22-25. We further submit that in applying proper legal standards, as a matter of foresight, and balancing the information available as to the long delays foreseen at Valleyfield due to congestion and inadequate facilities as against the fact that there would be no delays at Detroit—no prudent shipowner, controlling the voyage, would use a minor out-port such as Valleyfield [or any other unsuitable Canadian port] when a far superior alternate port such as Detroit was so immediately available.

Beyond any question, either the SINGAPORE TRADER *did not deviate* or the deviation (if any) *was reasonable.*

POINT II

The cargo interests waived any right they had to claim unreasonable deviation.

In *Farr* v. *Hain SS Co., Ltd.,* 121 F.2d 940, 944 (2 Cir. 1941), an unreasonable deviation was excused when the cargo interests, *who learned of the deviation while in progress,* had failed to protest or reserve their rights. Judge Learned Hand said:

> "But if he learns of a deviation while the voyage is in progress, and without protest or reservation of his rights, allows her to make good her fault, so far as she can, *it is certainly inconsistent with fair dealing for him afterwards to assert that the remainder of the voyage was not performed under the charter, for that will be the owner's ordinary assumption.* Nor is there authority lacking for this proposition besides the deci-

> sion of the House of Lords in this very case; for the situation is one common enough in the law of contracts. 'Farr' is asking to be freed from the limitations upon 'Hain's' promise to carry the sugar, and in its place to substitute a duty imposed by law which 'Hain' never assumed; to do so they must first wholly rid themselves of the contract in toto. In essence the situation is no different from other situations in which one party to a contract is privileged to declare it at an end and to pursue such remedies as the law raises in its place, e.g., the recovery of the consideration. It is well settled in such cases that the promisee will not free himself if, upon learning of the breach, he allows the promisor to go on with his performance without some warning that the contract is at an end. That is well settled in insurance." (Emphasis added.)

Here, all cargo interests were promptly notified that the SINGAPORE TRADER had been re-routed to Detroit. No cargo interests ever protested or reserved their rights, if any, to terminate the contract. It is inconsistent with fair dealing to permit them to rely on a claim of unreasonable deviation now.

POINT III

The deviation (if any) to Detroit was caused by the I.L.A. strike at New York. The shipowner is exempt from liability to cargo for any loss or damage resulting from strikes under COGSA, 46 U.S.C. § 1304(2)(j).

COGSA provides:

"Uncontrollable causes of loss."

"(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

* * *

"(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general * * *" 46 U.S.C. § 1304(2)(j).

The SINGAPORE TRADER was unable to complete discharging her cargo at New York because of the I.L.A. strike which covered the entire U.S. East and Gulf Coasts. The diversion to Detroit resulted solely from the I.L.A. strike. The shipowner is exempt from liability for losses to cargo resulting from strikes. *Hirsh Lumber Co.* v. *Weyerhaeuser Steamship Co.*, 233 F.2d 791, 794 (2 Cir. 1956); *Kroll* v. *Silver Line, Ltd.*, 116 F. Supp. 443 (N.D. Cal. S.D. 1953).

POINT IV

The district court correctly found that the sole cause of the stranding was an error in navigation. Thus the shipowner is entitled to exoneration from liability to cargo under COGSA, 46 U.S.C. § 1304(2)(a).

The applicable section of the Statute reads as follows:

"(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from— (a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship * * *" 46 U.S.C. § 1304(2)(a).

Finding that the accident was caused solely by error in navigation (111a), and following the intent of Congress, the district court should have granted the shipowner's complaint for exoneration from liability to cargo under COGSA, 46 U.S.C. § 1304(2)(a). *Director General of India Supply Mission* v. *S.S. MARU*, 459 F.2d 1370, 1371-1372 (2 Cir. 1972); *The Temple Bar*, 137 F.2d 293, 296 (4 Cir.

1943); *Complaint of Grace Line, Inc. (The Santa Leonor)*, 2 Cir. Docket No. 73-2657, 1975 A.M.C. 991, not yet officially reported.

POINT V

The shipowner is entitled to recover general average contributions and unpaid freight on his counterclaims against the cargo owners.

A. General Average

The bill of lading contract in paragraph 6 contains the standard "Jason clause" requiring cargo to contribute in general average even where the loss is the result of the carrier's negligence if the carrier is exempt from liability for such negligence by statute, contract or otherwise. The bill of lading contract here provides (74a):

> "6. Average * * *
> In the event of accident danger damage or disaster before or after commencement of the voyage resulting from any causes whatsoever whether or not due to negligence or unseaworthiness initial or otherwise for which or for the consequences of which the carrier is not responsible or is exempted from responsibility by law or contract or otherwise the shippers consignees or owners of the goods shall contribute with the carrier in general average to the payment of any sacrifices losses or expenses of a general average nature that may be made or incurred and shall pay any salvage and special charges incurred in respect of the goods * * *."

The general average clause is valid and enforceable. *The Jason*, 225 U.S. 32 (1912); *Cia Atlantica Pacifica, S.A.* v. *Humble Oil & Refining Company*, 274 F. Supp. 884 (D. Md. 1967).

Here the stranding was caused by an error in navigation for which the carrier is exempt from liability under COGSA, 46 U.S.C. § 1304(2)(a). Cargo should therefore be required to contribute to the payment of general average and salvage.

B. Freight

The bill of lading contract in paragraph 27 provides (74a):

> "27. Freight and Primage if prepaid is to be considered earned at the time of the receipt of the cargo for shipment, and is not returnable if ship be lost or not. Freight not prepaid is due on day of arrival of the goods at the port of destination and is payable before delivery, in cash, without deduction, carrying interest where payment is delayed at the rate of 5%, per annum. Where the carriage of the goods is abandoned and this contract is determined short of destination, freight if not prepaid shall be payable in proportion to the carriage. * * *"

Contractual provisions establishing the shipper's liability for freight regardless of actual delivery have been uniformly held valid, and have become common stipulations in carrier's bills of lading.

In *Allanwilde Transport Corporation* v. *Vacuum Oil Company*, 248 U.S. 377 (1919) certain cargos were shipped on a sailing vessel under contracts containing clauses providing that full freight was earned regardless if "* * * vessel lost or not lost, or if the voyage be broken up * * *." In the course of the voyage the vessel encountered a severe storm and put back to port for repairs. After repairs the vessel was prevented from sailing because she could not get clearance for a voyage to a war zone. The voyage was then

abandoned, but the carrier declined to refund the freight. The district court entered a decree granting the shippers recovery of their prepaid freight. The Circuit Court of Appeals for the Third Circuit certified several questions to the Supreme Court, including in part:

> "* * * did the contract thus evidenced justify the carrier under facts stated in refusing to refund the prepaid freight? * * *" (248 US 384).

The Supreme Court answered yes, stating at page 385:

> "Does the contract of the parties provide for such situation and take care of it, and assign its consequences? The charter party provides as we have seen, that 'freight to be prepaid net on signing bills of lading . . . Freight earned, retained and irrevocable, vessel lost or not lost.' And it is provided that this provision is, with other provisions, 'to be embodied' in the bill of lading. They seem necessarily, therefore, deliberately adopted to be the measure of the rights and obligations of shipper and carrier. Let us repeat: the explicit declaration is—'Freight to be prepaid net on signing bills of lading. . . . Freight earned, retained and irrevocable, vessel lost or not lost.' The provision was not idle or accidental. It is easy to make a charge of injustice against it if we consider only the defeat of the voyage and the non-carriage of the cargo. But there are opposing considerations. There were expected hazards and contingencies in the adventure and we must presume that the contract was framed in foresight of both and in provision for both. We cannot step in with another and different accommodation."

See also: *International Paper Company* v. *The Schooner Gracie D. Chambers*, 248 U.S. 387, 391-392 (1919); *Standard Varnish Works* v. *The BRIS*, 248 U.S. 392 (1919).

Here, of course, the cargo was delivered, either at New York or at Ogdensburg after the stranding. Freight is properly payable "vessel lost or not lost," etc. and in situations where cargo is not delivered at all. Clearly the shipowner here is entitled to retain all freight paid and recover on its counterclaim in these actions all freight not yet paid.

The bills of lading express the contracts of the parties; the contracts are valid, and should be upheld by this Court.

POINT VI

Alternatively, if there was any fault or negligence on the part of the shipowner's servants with respect to the alleged deviation (which is denied), it was without the privity or knowledge of the shipowner, and the shipowner would be entitled to limitation of liability, 46 U.S.C. § 183.

Under the law, 46 U.S.C. § 183, "if there is fault or negligence on the part of the shipowner's employees or agents but the loss, damage or injury resulting therefrom is done or occasioned *without* the shipowner's privity or knowledge, then the shipowner's liability shall not exceed the amount or value of his interest in the vessel and her freight then pending.

In *The 84-H*, 296 F. 427, 431 (2 Cir. 1923), this court defined "privity or knowledge" as follows:

> "The privity or knowledge *must be actual and not merely constructive.* It involves a *personal participation* of the owner in some *fault or act of negligence causing or contributing to the injury suffered. There must be some fault or negligence on his part or in which he in some way participates.*" (Emphasis added.)

In *The La Bourgogne*, 210 U.S. 95 (1908), a case involving a collision between two ships, the Supreme Court said at page 122:

> "* * * it has been long since settled by this court that *mere negligence, pure and simple,* in and of itself does not . . . establish the existence on the part of the owner of a vessel of privity and knowledge within the meaning of the statute * * *." (Emphasis added.)

In *Robinson, Admiralty Law in the United States,* (West Publishing Co.) at page 942:

> "There must be some personal concurrence, or some *fault or negligence on the part of the owner himself, or in which he personally participates, to constitute such privity, within the meaning of the act, as will exclude him from the benefit of its provisions. The accent here is upon 'personal' privity as distinguished from imputation of fault.*" (Emphasis added.)

In those few deviation cases in which a shipowner has been denied limitation of liability under 46 U.S.C. § 183, the deviations were held unreasonable because the shipowner *personally* ordered the ship to call at ports not permitted by the contract to lift additional cargo—with *no* motive other than to increase his own revenues. This occurred in two pre-COGSA cases; *The Pelotas,* 66 F.2d 75 (5 Cir. 1933), and *The Frederick Luckenbach,* 15 F.2d 241 (S.D.N.Y. 1926), where apparently the courts equated the "unreasonable" deviations with "privity or knowledge" under the limitation statute. Limitation of liability was denied in both cases—except that exoneration from liability was granted as to one lot of cargo in *The Frederick Luckenbach,* which lot was covered by a broader liberties clause than the other lots of cargo. [Under the liberties clauses §§ 3-5 in the SINGAPORE TRADER's bill of lading con-

tracts (74a), the changes in route of the PELOTAS and the FREDERICK LUCKENBACH would not constitute deviations.]

The district court here did not discuss his reasons for denying the shipowner's demand for limitation of liability except for accepting cargo's suggestions that privity existed (103a para. 21 and 105a para. 6)—while striking out allegations of fault (105a para. 10). The district court also noted (120a): "The failure of the vessel to perform in this case is directly due to the act of the owner;" while citing only *The ISIS*, 290 U.S. 333 (1933)—which did not concern limitation of liability. In *The ISIS*, the shipowner was denied exoneration to cargo under the Harter Act, 46 U.S.C. § 192 because the shipowner, through his marine superintendent, *negligently failed* to discover certain rudder damage to the ship, and thus the shipowner was held to have failed to exercise due diligence to make the ship in *all* respects seaworthy, etc. (a different standard than applied by COGSA).

The situation at bar is quite different from *The ISIS* or *The Pelotas*, etc.

We submit the district court here erred in apparently finding *privity without* first finding *fault or negligence* on the part of the shipowner or his servants or agents.

Here no fault or negligence has been found on the part of the shipowner in his decision to divert the SINGAPORE TRADER to Detroit. He justifiably relied on the advice and recommendations of his local port agent in New York that, in all the circumstances, Detroit was the "best alternate port," at which he could be reasonably sure of discharging and delivering the cargo without the long delays foreseen at all Canadian ports. *The Styria, supra*, p. 32. His sole motive was thus a benefit to cargo.

If this court disagrees with the district court and finds fault or negligence on the part of Gannet or Colley (the shipowner's limited or special agent and sub-agent respectively) in connection with their investigations of the Canadian port or their recommendation to the shipowner, then this court should hold that such fault or negligence was *without* the *privity* or knowledge of the shipowner and grant the shipowner's demand for limitation of liability.

Further, there is a substantial question as to whether the doctrine of "unreasonable" deviation ought to continue to exist, and, if so, what its effect should be vis-a-vis statutory limitations of liability. See this court's comments in *Iligan Integrated Steel Mills, Inc.* v. *SS John Weyerhaeuser*, 507 F.2d 68, 70-72 (2 Cir. 1974); and *Gilmore and Black, The Law of Admiralty*, (2nd Ed.) §§ 3.40, 3.41.

Many years ago, a policy decision was made to make the shipowner stand as an insurer of the cargo when the ship unreasonably deviated, by abrogating the exemption from liability contained in the bill of lading contract and COGSA. This court said that the doctrine "has been justified *in part by what is—or at least was*—the especially serious effect of such deviation on the shippers," 507 F.2d 72, because in the early cases, the shipper became uninsured through the "fault" of the shipowner. The cargo owner no longer suffers this problem. Now the cargo underwriters receive a windfall profit if the ship is held to have unreasonably deviated. Since the premise for the doctrine of unreasonable deviation no longer exists, we submit that there is no basis for continuing it. Certainly the doctrine should have no greater effect on the shipowner's right to limitation of liability under 46 U.S.C. § 183 than any other fault or negligence of the shipowner's servants or agents.

As this court said in *Iligan*, 507 F.2d 73:

> "* * * it is more practical and economical from the point of view of insurance to spread the risk to the cargo in excess of a fixed limit among a number of cargo insurers rather than to concentrate it in the carrier's [protection and indemnity] insurer."

Citing: *Diplock, Conventions and Morals—Limitation Clauses in International Maritime Conventions*, 1 J. Mar. L. & Comm. 525, 528-29 (1970). These issues should probably await a case in point.

Here, since no fault or negligence existed—there is no liability to be limited. Rather the deviation (if any) was *not* unreasonable and the shipowner is entitled to exoneration from liability to cargo under COGSA, 46 U.S.C. §§ 1304(2)(a) and (j).

There are issues concerning damages other than those which are directly related to the stranding, and upon the consideration of damages, which has been reserved for future hearings, the shipowner reserves the right to renew his contentions that he is entitled to limitation of liability as to all cargo damage occurring during the voyage as to which he may not be entitled to exoneration, if any.

CONCLUSION

The Interlocutory Judgment below should be reversed. The diversion of the SINGAPORE TRADER to Detroit was *not* an unreasonable deviation. The shipowner is entitled to: (a) exoneration from liability to cargo under 46 U.S.C. §§ 1304(2)(a) and (j); (b) judgment against the cargo owners on his counterclaims for general average contributions and unpaid freight; and (c) costs.

Respectfully submitted,

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CERTIFICATE OF SERVICE
OF BRIEF ON BEHALF OF PLAINTIFFS-APPELLANTS
AND JOINT APPENDIX

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